

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUSAN MAE POLK,

Plaintiff,

v.

JAMES CAVIN, Deputy; MATT
CHERTKOW, Lt.; CONTRA COSTA
COUNTY SHERIFF'S DEP'T,

Defendants.

No. C 08-1483 MMC (PR)

**ORDER OF SERVICE; DENYING
MOTION TO DISQUALIFY**

(Docket No. 13)

On March 17, 2008, plaintiff, a California prisoner incarcerated at the Central California Women's Facility in Chowchilla, California ("CCWF"), and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983. By order filed April 28, 2008, the Court found plaintiff's allegations, when liberally construed, state a cognizable claim against Contra Costa County Sheriff's Deputy James Cavin ("Cavin") for the use of excessive force. As plaintiff's allegations did not suffice, however, to state cognizable claims for relief against the two other named defendants, specifically, Lt. Matt Chertkow and the Contra Costa County Sheriff's Department, the claims against those two defendants were dismissed with leave to amend.

Further, the Court determined that in addition to the pleading deficiencies discussed above, it appeared from the face of the complaint that plaintiff's claims are barred by the applicable statute of limitations. Specifically, based on the allegations in the complaint, plaintiff's excessive force claim accrued on August 29, 2003, the date on which she was injured, and under applicable case law plaintiff therefore had, at best, until August 29, 2007

to file a timely complaint. Plaintiff, however, did not file her complaint until March 17, 2008. Nevertheless, as plaintiff alleged that she had been prevented by custodial officials from bringing her complaint earlier, the Court granted plaintiff leave to amend to show the complaint was not time-barred. Specifically, the Court found as follows:

The doctrine of equitable estoppel may serve to bar application of the statute of limitations as a defense where a plaintiff who knows of her cause of action reasonably relies on the defendant's statements or conduct in failing to bring suit. Sitt v. Williams, 919 F.2d 516, 522 (9th Cir. 1990). In California, a defendant may be equitably estopped from asserting the statute of limitations defense if the plaintiff was prevented from timely filing a claim as the result of duress caused by the defendant during the applicable limitations period. See Ateeq v. Najjar, 15 Cal. App. 4th 1351, 1357 (1993) (finding defendant equitably estopped from asserting statute of limitations defense where defendant's repeated threats of deportation caused plaintiff to delay filing suit). Here, however, application of the equitable estoppel doctrine does not appear to be warranted because the period during which plaintiff was allegedly subjected to duress by Cavin and Chertkow ended when she was transferred to state prison on February 27, 2007, approximately six months before the statute of limitations expired on August 29, 2007. Once plaintiff was transferred out of the custody of the Contra Costa County Sheriff's Department to CCWF, she no longer was in danger from Cavin and Chertkow's threats of harm should she file a civil action against them and, thus, she could have timely filed her complaint.¹

In sum, it appears from the face of the complaint and the declaration attached thereto that plaintiff's claims have been brought outside of the applicable statute of limitations period and must be dismissed. Plaintiff will be granted leave to amend to allege facts showing why her claims are not time-barred.

¹ Actions allegedly taken by CCWF prison employees after plaintiff arrived at CCWF would not equitably estop application of the statute of limitations defense as to plaintiff's claims against Cavin, Chertkow and the Contra Costa County Sheriff's Department, because no CCWF employee is a defendant to those claims.

(Order, filed Apr. 28, 2008, at 3:20-4:14.)

On May 15, 2008, plaintiff filed a first amended complaint, on December 22, 2008, she filed a second amended complaint, and on January 9, 2009 she filed a third amended complaint. Liberally construed, the allegations in the third amended complaint ("TAC")¹ state the following cognizable claims for relief: (1) the use of excessive force on August 29,

¹The TAC supercedes plaintiff's first and second amended complaints. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

2003, by defendant Cavin; (2) supervisory liability based on the failure of defendant Chertkow to properly train Cavin and respond to Cavin's use of force; and (3) supervisory liability based on Contra Costa County Sheriff Warren Rupf's implementation of a policy of placing "the most aggressive and violent officers in charge of the most vulnerable" inmates. (TAC ¶ 34.)

In addition to the above-noted claims, plaintiff raises claims against various prison officials at CCWF, where plaintiff currently is incarcerated, alleging such officials prevented her from filing a timely complaint by denying her access to the law library, legal supplies, legal materials, and access to a phone; liberally construed, such allegations state a cognizable claim for denial of access to the courts. See Lewis v. Casey, 518 U.S. 343, 350 (1996) (holding prisoners have constitutional right of access to courts).²

With respect to the question of timeliness, the Court, based on plaintiff's allegations concerning attempts on the part of defendants to prevent plaintiff from filing the instant action, the Court will not at this time dismiss the complaint as time-barred. In so doing, the Court does not decide that a properly supported motion to dismiss on statute of limitations grounds would not succeed. Rather, the burden has now shifted to defendants with respect to whether they will assert such an affirmative defense.

Lastly, the Court addresses plaintiff's recently-filed Motion to Disqualify, in which she moves, under 28 U.S.C. § 144, to disqualify the undersigned from presiding over this matter. Plaintiff's motion is premised solely on her contention that the Court is biased against her because the complaint has not yet been ordered served.

A party may move to disqualify, or recuse, a judge from presiding in a given case.

²As CCWF is located in Chowchilla, which, in turn, is located in Madera County, a civil rights action brought by plaintiff solely against the CCWF defendants would be properly venued in the United States District Court for the Eastern District of California. See 28 U.S.C. § 84(b). In the instant matter, however, plaintiff names defendants who reside in both the Northern and Eastern Districts. Accordingly, venue is proper in this district. See 28 U.S.C. § 1391(b) (providing, inter alia, that when jurisdiction is not founded solely on diversity, venue is proper in the district in which "any defendant resides, if all of the defendants reside in the same state"). The Court makes no determination at this time as to whether the claims against the CCWF defendants are improperly joined under Rule 21 of the Federal Rules of Civil Procedure.

1 Motions to disqualify fall under two statutory provisions, 28 U.S.C. § 144 and 28 U.S.C.
2 § 455. Section 144 provides for recusal where a party files a timely and sufficient affidavit
3 averring that the judge before whom the matter is pending has a personal bias or prejudice
4 either against the party or in favor of an adverse party, and setting forth the facts and reasons
5 for such belief. See 28 U.S.C. § 144. Similarly, § 455 requires a judge to disqualify himself
6 “in any proceeding in which his impartiality might reasonably be questioned,” 28 U.S.C. §
7 455(a), including where the judge “has a personal bias or prejudice concerning a party,” id. §
8 455(b)(1).

9 A judge finding a § 144 motion timely and the affidavits legally sufficient must
10 proceed no further and another judge must be assigned to hear the matter. See id.; United
11 States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980). Where the affidavit is not legally
12 sufficient, however, the judge at whom the motion is directed may determine the matter. See
13 id. at 868 (holding judge challenged under § 144 properly heard and denied motion where
14 affidavit not legally sufficient).

15 The substantive test for personal bias or prejudice is identical under §§ 144 and 455.
16 See Sibla, 624 F.2d at 868. Specifically, under both statutes recusal is appropriate where “a
17 reasonable person with knowledge of all the facts would conclude that the judge’s
18 impartiality might reasonably be questioned.” Yagman v. Republic Ins., 987 F.2d 622, 626
19 (9th Cir. 1993) (citation omitted). Consequently, an affidavit filed under § 144 will raise a
20 question concerning recusal under §§ 455(a) and (b)(1) as well. Sibla, 642 F.2d at 867.

21 Here, as noted, plaintiff moves to disqualify the undersigned on the ground of bias and
22 prejudice based on the Court’s failure to order the instant complaint served. Plaintiff’s
23 allegations categorically fail to establish any basis, under either § 144 or § 455, for a
24 determination that the Court’s impartiality might reasonably be questioned herein, and,
25 consequently, are insufficient as a matter of law. See Liteky v. United States, 510 U.S. 540,
26 555 (1994) (holding judicial rulings on basis of facts introduced or events occurring in course
27 of judicial proceedings “almost never” provide grounds for recusal); Sibla, 624 F.2d at 868
28 (holding affidavit not legally sufficient unless it alleges facts demonstrating bias or prejudice

1 that “stems from an extrajudicial source”).

2 Accordingly, the motion to disqualify will be denied.

3 **CONCLUSION**

4 For the reasons stated above, the Court orders as follows:

5 1. Plaintiff’s motion to disqualify is hereby DENIED. (Docket No. 13.)

6 2. The Clerk of the Court shall issue summons and the United States Marshal shall
7 serve, without prepayment of fees, a copy of the complaint in this matter, all attachments
8 thereto, and a copy of this order upon: (1) defendants Deputy James Cavin, Sgt. Matt
9 Chertkow and Sheriff Warren Rupf at the Contra Costa County Sheriff’s Department;
10 (2) defendants Sgt. Roberts and Sgt. Gibson at the Central California Women’s Facility in
11 Chowchilla; and (3) defendant Warden Gail Patrick at the California Department of
12 Corrections in Sacramento. The Clerk shall also mail courtesy copies of the complaint and
13 this order to the California Attorney General’s Office.

14 3. Within **ninety (90)** days of the date this order is filed, defendants shall file a
15 motion for summary judgment or other dispositive motion with respect to the claim found to
16 be cognizable above.

17 a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed
18 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
19 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,
20 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810
21 (2003).

22 b. Any motion for summary judgment shall be supported by adequate factual
23 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
24 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
25 **qualified immunity found, if material facts are in dispute. If defendants are of the**
26 **opinion that this case cannot be resolved by summary judgment, defendants shall so**
27 **inform the Court prior to the date the summary judgment motion is due.**

28 4. Plaintiff’s opposition to the dispositive motion shall be filed with the Court and

1 served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

2 a. In the event defendants file an unenumerated motion to dismiss under Rule
3 12(b), plaintiff is hereby cautioned as follows:³

4 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
5 the Federal Rules of Civil Procedure, on the ground you have not exhausted
6 your administrative remedies. The motion will, if granted, result in the
7 dismissal of your case. When a party you are suing makes a motion to dismiss
8 for failure to exhaust, and that motion is properly supported by declarations (or
9 other sworn testimony) and/or documents, you may not simply rely on what
10 your complaint says. Instead, you must set out specific facts in declarations,
11 depositions, answers to interrogatories, or documents, that contradict the facts
12 shown in the defendant's declarations and documents and show that you have
13 in fact exhausted your claims. If you do not submit your own evidence in
14 opposition, the motion to dismiss, if appropriate, may be granted and the case
15 dismissed.

16 b. In the event defendants file a motion for summary judgment, the Ninth
17 Circuit has held that the following notice should be given to plaintiffs:

18 The defendants have made a motion for summary judgment by which
19 they seek to have your case dismissed. A motion for summary judgment under
20 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

21 Rule 56 tells you what you must do in order to oppose a motion for
22 summary judgment. Generally, summary judgment must be granted when there
23 is no genuine issue of material fact--that is, if there is no real dispute about any
24 fact that would affect the result of your case, the party who asked for summary
25 judgment is entitled to judgment as a matter of law, which will end your case.
26 When a party you are suing makes a motion for summary judgment that is
27 properly supported by declarations (or other sworn testimony), you cannot
28 simply rely on what your complaint says. Instead, you must set out specific
facts in declarations, depositions, answers to interrogatories, or authenticated
documents, as provided in Rule 56(e), that contradict the facts shown in the
defendants' declarations and documents and show that there is a genuine issue
of material fact for trial. If you do not submit your own evidence in opposition,
summary judgment, if appropriate, may be entered against you. If summary
judgment is granted in favor of defendants, your case will be dismissed and
there will be no trial.

22 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
23 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.
24 317 (1986) (holding party opposing summary judgment must come forward with evidence
25 showing triable issues of material fact on every essential element of his claim). Plaintiff is

27 ³The following notice is adapted from the summary judgment notice to be given to pro
28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 cautioned that failure to file an opposition to defendants' motion for summary judgment may
2 be deemed to be a consent by plaintiff to the granting of the motion, and granting of
3 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.
4 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

5 5. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's
6 opposition is filed.

7 6. The motion shall be deemed submitted as of the date the reply brief is due. No
8 hearing will be held on the motion unless the Court so orders at a later date.

9 7. All communications by the plaintiff with the Court must be served on defendants,
10 or defendants' counsel once counsel has been designated, by mailing a true copy of the
11 document to defendants or defendants' counsel.

12 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
13 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
14 required before the parties may conduct discovery.

15 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
16 informed of any change of address and must comply with the court's orders in a timely
17 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
18 pursuant to Federal Rule of Civil Procedure 41(b).

19 10. Any motion for an extension of time must be filed no later than the deadline
20 sought to be extended and must be accompanied by a showing of good cause.

21 This order terminates Docket No. 13.

22 IT IS SO ORDERED.

23 DATED: April 30, 2009

24 
MAXINE M. CHESNEY
25 United States District Judge
26
27
28